82-1221

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEAN S. HARRIS,

Petitioner,

—*vs.*—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Questions Presented

1. Where an "in-custody" murder suspect asks to speak to her counsel on the telephone, does the introduction of an inculpatory statement, made on the telephone to counsel and "inadvertently overheard" by a police officer violate the suspect's Fifth Amendment right not to incriminate herself and her Sixth Amendment right to counsel?

2. Whether the failure to close pretrial hearings which serve to revive and augment prior massive publicity about a notorious murder case, violates the petitioner's right to a fair trial under the Sixth Amendment absent proof of actual prejudice?

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Petitioner, JEAN S. HARRIS, prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals rendered in the above entitled proceeding on November 16, 1982.

Opinions Below

The trial of the petitioner took place in the County Court of Westchester County, New York before a jury. The opinion rendered by the trial judge denying petitioner's motion to close the pretrial hearings is unreported and is reprinted as Appendix A. at p. A-1, *infra*. The Appellate Division, Second Department affirmed the judgment of conviction in an opinion reported at *People* v. *Harris*, 84 A.D.2d 63, 445 N.Y.S.2d 520 (2d Dept. 1981). It is reprinted as Appendix B at p. A-4, *infra*. The Court of Appeals of New York affirmed the judgment of the Appellate Division in an opinion reported at *People* v. *Harris*, 67 N.Y.2d 335, N.Y.S.2d (1982). It is reprinted as Appendix C at p. A-30, *infra*.

Jurisdiction

On February 24, 1981 a Westchester County jury, after deliberating for eight days, found Jean Harris guilty of murder in the second degree and two counts of criminal possession of a weapon. On March 20, 1981 Jean Harris was sentenced to 15 years to life at the Bedford Hills Correctional Facility in upstate New York.

On December 30, 1981 the Appellate Division, Second Department affirmed Jean Harris' conviction in an opinion reported at *People* v. *Harris*, 84 A.D.2d 63, 445 N.Y.S.2d 520 (2d Dept. 1981).

On November 16, 1982 the judgment of the Appellate Division was affirmed by the New York Court of Appeals in an opinion reported at *People* v. *Harris*, 57 N.Y.2d 335, N.Y.S.2d (1982).

Under Rule 20.1, this Petition was due January 15, 1983. However, it was filed five days late because the undersigned counsel inadvertently omitted to secure a 30-day extension due to several heavy professional commitments, including preparation for the defense of a major criminal case in Houston, Texas, scheduled to begin this month. Counsel practices alone in a branch office in New York City some distance away from the main office of his firm in Buffalo, New York. The petitioner should not be penalized for counsel's inadvertent oversight. This is particularly true where, as here, there are profound and significant issues arising under the Fifth and Sixth Amendments to the United States Constitution. In addition, the New York Court of Appeals has rendered a decision on those important issues which has obvious precedential impact on the administration of these critical constitutional rights, as illustrated by this Petition.

The Court has the discretion and power to consider such an out-of-time Petition in a case such as this. *Schacht* v. *United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), *see also*, R. Stern & E. Gressman, *Supreme Court Practice* 390-395

(5th ed. 1978) and the cases cited therein.* Because of the significance of the unique questions presented by this case, the Court is respectfully requested to entertain the Petition on the merits and waive the requirements of Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions And Statutes Involved

Amendment V provides in pertinent part:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Amendment XIV provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Statement Of The Case

Jean Harris met Dr. Tarnower in 1966 (6768).** Their love affair, which flourished for 14 years, was distinguished by trips abroad, Caribbean vacations and holidays spent in Palm Beach

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* In *Schacht* the Court stressed that "the procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so required." *Shacht v. United States, supra,* at 63-64. In *Fuller v. Alaska,* 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968), the Court granted leave where counsel filed a petition a month after the 90-day time limit expired. In *United States* v. *Mazurie,* 415 U.S. 947, 94 S.Ct. 1468, 39 L.Ed.2d 562 (1974), the Court granted the government's out-of-time petition where it was filed late due to an administrative omission in a large office.

** Page citations refer to the Record on Appeal in the New York Court of Appeals.

(6769-72). She helped him write his Diet Book and stayed with him in Purchase, New York for extended periods of time (6804-05).

However, in 1979 and 1980, a number of personal calamities befell Jean Harris that made her life unbearable (6822-25). Among the more critical were:

1) She believed she had lost the support of the Madeira School Board where she was Headmistress, and knew she would have to look for another job (6882-83);

2) She had to expel four graduating seniors because they were caught using marijuana (6993-97); and

3) Suffering from exhaustion, she had been taking methamphetamines (Speed) and her supply ran out at that critical moment (7000).

These private tragedies drove her into a deep depression and she decided to end her life at the peaceful setting of the residence which for 14 years had become her home away from work. On March 10, 1980 she made out her Will and told her closest friends that life was not worth living any more (5442); left instructions that she was to be cremated (7110); and wrote her secretary directing how her personal belongings were to be distributed.

She drove to Harrison, New York, arriving at the Doctor's home at about 10:30 P.M. (7161). She went to his bedroom, hoping for a few moments of peace before ending her life by the pond outside the house (7114). When another woman's belongings were found in his bathroom, she threw them about and the Doctor slapped her face (7168-70). Stunned by this unexpected action, Jean Harris was about to leave the house when, feeling the weight of the gun in her pocketbook, she attempted to end it all right then and there (7173-74). The Doctor tried to take the gun from her setting in motion a chain of events that ultimately led to his death.

When the police arrived Jean Harris forthrightly told them about her failed suicide and that she knew the Doctor had been

shot in the hand (1931). In her purse a police officer found the written names of people to be notified of her death (1594). She told them she had no intention of returning to Virginia alive (1594).

After Jean Harris was arrested on March 10, 1980, she asked the police if she could call her lawyer after having received her *Miranda* advice (2226-28). A police officer placed the call to her attorney, handed the telephone to Jean Harris and left the room (2229). However, another police officer deliberately remained just outside the room and listened to Jean Harris' conversation (A2271). She was unaware that the policeman was listening to her call. The police officer was permitted to testify at her trial, over defense counsel's strenuous objection, that she said to her lawyer, "Oh, my God, I think I've killed Hy" (A2272).

The principal question presented to the jury for resolution was whether the shooting of Dr. Tarnower was accidental or intentional. Jean Harris' statement to her attorney—"Oh, my God, I think I've killed Hy"—was the only time she used the word "killed" (2272). The prosecutor seized upon this statement and fully exploited it in his summation. On no less than four separate occasions he lashed out at the jury arguing forcefully, at the very end of his summation, that Jean Harris' statement to her lawyer proved conclusively her intent to "kill" the Doctor (9229).*

The Appellate Division, Second Department found this testimony violated Jean Harris' right to counsel, by concluding:

> "In keeping with our State's policy of jealously guarding the right to counsel, we hold that, once that right has attached, no statement which a suspect directs to

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* "Ladies and Gentlemen, if you have any question on the issue of *intent*, not only do you have the statement, 'I did it' but what did she say into the telephone? Without tears, *'Oh, my God, I think I've killed Hy'* then again, *'Oh, my God, I think I've killed Hy'*. Officer Tamilio told you that—*'Oh, my God, I think I've killed Hy'*. This is from the words of a witness who said, when she left the bedroom that night, as far as she knew, the Doctor had a wound to the hand. *'Oh, my God, I think I've killed Hy'* " (9229, emphasis supplied).

> his attorney may be reported at trial by a police officer, regardless of whether he intentionally or inadvertently overheard it" 84 A.D.2d at A-47

The Appellate Division found this constitutional error was harmless. However, the New York Court of Appeals in affirming petitioner's conviction concluded that there was no violation of defendant's right to counsel because "the statement was neither induced, provoked nor encouraged by the actions of the police" and that the eavesdropping was unintentional.* The court also found that the attorney-client privilege was not breached because Jean Harris spoke to her lawyer in the known presence of a police officer and one of Dr. Tarnower's housekeepers.

A number of the country's outstanding medical and forensic experts, through the analysis of physical evidence taken from the scene, confirmed Jean Harris' version of how the Doctor died. Professor Herbert L. MacDonell, the Nation's leading criminologist, fully corroborated Jean Harris' statement about Dr. Tarnower's unintentional death. His testimony was unrebutted.

Despite all the convincing evidence that pointed to Jean Harris' innocence, the jury, after deliberating for eight days, found her guilty of murder in the second degree, and two counts of criminal possession of a weapon.

On December 30, 1981 the Appellate Division, Second Department affirmed Jean Harris' conviction. On November 16, 1982, the New York Court of Appeals affirmed the judgment of the Appellate Division.

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* Petitioner's briefs in both the Appellate Division and the Court of Appeals squarely placed in issue her federal constitutional rights to counsel and an impartial jury (Pp. 18-29; 52-59 Appellant's Brief in Court of Appeals; Pp. 35-40; 85-90 Appellant's Brief in Appellate Division, Second Department).

Reasons for Granting the Writ

I

Where an "in-custody" murder suspect asks to speak to her counsel on the telephone, the introduction of an inculpatory statement, made on the telephone to counsel and "inadvertently overheard" by a police officer violates her Fifth Amendment right not to incriminate herself and her Sixth Amendment right to counsel.

The critical issue presented by this case, which is of first impression, involves the disclosure by the prosecution of a statement made by the petitioner during a telephone conversation with her attorney which was found by the New York Court of Appeals to have been "inadvertently overheard" by a police officer who was standing nearby when the call was made. There has never been a ruling by this Court on the question of whether the introduction into evidence of the overheard conversations with counsel violates a suspect's Fifth Amendment right not to incriminate herself and her Sixth Amendment right to counsel.

The Court of Appeals ruling sustaining the use of this kind of incriminatory evidence clearly undermines the whole policy of *Miranda*. To be meaningful, the *Miranda* doctrine must allow the suspect to talk to counsel with utmost candor and confidentiality. And the accused, once she has exercised her right to speak to counsel, has a constitutionally protected expectation of privacy in such conversations. To permit the disclosure of overheard conversations with counsel will encourage police officers, throughout the nation, not to take any precautions against overhearing the private conversations between a client and her lawyer.

There are actually two independent constitutional values that are jeopardized by eavesdropping on the private communications between suspects and their lawyers. The first implicates the integrity of the right to counsel entwined with the privilege against self incrimination. The second, and one of equal concern, involves the State's intrusion into the confidential lawyer-client communications which threatens a suspect's right to the

effective assistance of counsel. This Court has held, in an unbroken series of cases extending over a long stretch of its history, that the right to counsel encompasses the right of easy access to a lawyer. *Geders* v. *United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Reynolds* v. *Cochran*, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961); *Hawk* v. *Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61 (1945); *Avery* v. *Alabama*, 301 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 70 L.Ed. 158 (1932).

Obviously, if a suspect knows that damaging information she discloses to her attorney in exchange for advice can be used against her, the client will be most reluctant to confide in her lawyer and it will be difficult to obtain any informed legal advice. For this reason it has long been recognized that "the essence of the Sixth Amendment right is . . . privacy of communication with counsel" *United States* v. *Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied*, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672 (1974). *See also*, *Caldwell* v. *United States*, 92 U.S. App. D.C. 355, 205 F.2d 879 (1953); *Coplon* v. *United States*, 89 U.S. App. D.C. 103, 191 F.2d 749 (1951); *Louie Yung* v. *Coleman*, 5 App. Supp. 702, 703 (Idaho 1934); cf., e.g., *In re Rider*, 50 Cal. App. 791, 195 P. 965 (1920); *Thomas* v. *Mills*, 117 Ohio St. 114, 157 N.E. 488 (1927); *State ex rel Tucker* v. *Davis*, 9 Okl. Cr. 94, 130 P. 962 (1913); *Turner* v. *State*, 91 Tex. Cr. R. 627, 241 S.W. 162 (1922); Annot. 5 A.L.R.3d 1360 (1966). Significantly, this Court has never addressed this very issue.

The only practical way to make certain that defendants will feel free to communicate frankly with their lawyers is to prohibit the State from disclosing these confidential communications. Such a *per se* rule of exclusion is fully supported, if not compelled, by the spirit of this Court's decisions in *Black* v. *United States*, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966) and *O'Brien* v. *United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967) where lawyer-client conversations were intercepted by surveillance devices installed by the government to investigate crimes unrelated to the offenses for which the defendants were convicted.

Under the Sixth Amendment it makes no difference how the police heard the defendant's statement once she was represented by counsel. Jean Harris had every right to assume, once she invoked her right to confer with her attorney, that nothing she said to her lawyer would be used against her. A rule that offers defendants relief only when they can prove a police officer intentionally or deliberately eavesdropped on conversations with their lawyers, is little better than no rule at all. Proving that a police officer deliberately listened in on lawyer-client conversations requires the officer to admit his own wrongdoing—the most difficult of tasks.

Simply stated, once defendant's constitutional right to counsel attached (when she first asked to talk with her lawyer) no statement made to her attorney can be used against her. This significant constitutional right cannot be vitiated by either the police officer's inadvertent or deliberate eavesdropping.

For example, if Jean Harris had been conferring with her attorney in a jail cell and a police officer, whose duty it was to patrol the corridor, inadvertently overheard her conversation with her lawyer, the statements to her counsel clearly could not be used against her.

If the constitutional right to counsel is made to depend upon whether the police officer's access to a suspect's statement made to his attorney was accidental or deliberate, the Sixth Amendment would be seriously depreciated. Such a doctrine would generate a host of difficult factual controversies leading to perennial appellate review. The only meaningful rule which is consistent with the long history of the Sixth Amendment is that, when a person confers with his counsel, nothing he says can be used to incriminate him.

The Court of Appeals' conclusion that Jean Harris somehow forfeited her right to confer privately with her attorney because she spoke in the presence of one or two other persons is plainly wrong. Obviously, in this case, the police officers had control of the Tarnower home and Mrs. Harris, who was in custody. Consequently, Jean Harris had no choice over the place where

she was allowed to call her lawyer. She had no power to tell anyone to leave the room.

Once it became apparent that Jean Harris wanted to speak with her attorney, the police had an affirmative duty to provide her with a private place in which she could consult with her lawyer or, in failing to do so, any statements made to her attorney could not be used to incriminate her.

This case teaches us better than any other that constitutional rights are not self enforcing. Courts, such as this one, must carefully guide their implementation. The realization that the petitioner has been condemned to what amounts to life imprisonment based upon the statement made to her lawyer, which she had every right to believe would not be disclosed to anyone, is reason enough to grant this Petition. However, of much greater importance is the awesome realization that such unwarranted interference with the right to counsel affects the integrity of our whole judicial system. For all these reasons, the Petition for Certiorari should be granted.

II

The decision below raises an important and novel problem concerning the impact of massive publicity generated by pretrial hearings on a murder defendant's right to a fair trial.

This is the first criminal case to reach this Court where a defendant convicted of murder was deprived of a fair trial because the trial judge refused to exclude the press from pretrial hearings in direct defiance of *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). New York's newly formulated rule, requiring that a defendant in a criminal case prove *actual* prejudice in the wake of a trial atmosphere that has been utterly corrupted by antagonistic press coverage, is at odds with the decisions of this Court interpreting the Sixth Amendment.

Dr. Tarnower died on March 10, 1980. Within 24 hours, before a single piece of evidence was ever presented to a grand jury, reports of his murder blared from television sets and appeared in banner headlines throughout Westchester County and the rest of the country. The media extravaganza that was launched lies beyond the vocabulary of exaggeration. The Jean Harris murder prosecution is, beyond a doubt, one of the most publicized trials in recent American history.* Recognizing that the defense would be seriously imperiled by this adverse publicity, trial counsel immediately took steps to restrict this insidious, "run away" publicity.

The Closure Motion

Alert to the impending calamity that would surely occur if the suppression hearings were held while the jury was actually being selected, counsel moved, under the authority of the *Gan-*

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* On March 24, 1980, TIME and NEWSWEEK ran feature articles on Jean Harris. On March 31, 1980, NEW YORK Magazine ran a cover story on the Jean Harris case. By May 2, 1980, Leisure Books, Inc. published and distributed to newsstands a paperback book entitled "The Scarsdale Murder".

nett case, to exclude the press from pretrial hearings in order to insulate the jury from such prejudicial publicity (A1080). The trial judge denied this application stating quite candidly, "The statements which are the subject matter of the suppression hearings are a matter of public record" (A1080). He went on to say, "To close the doors at this time, under the circumstances, would be similar to 'closing the barn door after the horse is gone' " (A1081). Incredible as it may seem the widely publicized pretrial hearings addressing such sensitive issues as the suppression of bullets found in Mrs. Harris' car and the "confession" claimed to have been made by her were conducted simultaneously with the selection of the jury.

The trial court's decision was catastrophic. The hearings proceeded on certain days of the week while, on alternate days, the jury was being selected. This process continued for several weeks. Potential jurors were walking into the courtroom with newspapers under their arms that carried headlines such as, "HARRIS CONFESSED KILLING: . . .,"; "OFFICER TESTIFIES MRS. HARRIS SAID SHE WAS SLAYER"; "SHE TOLD ME HARRIS SHOT DOCTOR,. . ."; "DIET DOCTOR'S GIRL HOPED TO DIE WITH HER LOVER".* Both the prosecutor and the trial judge later conceded there was no claim of a "confession" (A186). However, by then appellant's "confession" had become a household word. All hope of obtaining an impartial jury was lost. The raw newspaper sensationalism, which sprung from the pretrial hearings, demonstrates the enormity of the prejudice inflicted upon the Harris jurors—the very type of prejudice sought to be outlawed by both the letter and spirit of the *Gannett* case. There was no way a juror's impartiality could survive in the face of the ferocious notoriety

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* *The New York Times*, November 18, 1980 at p. B-25 reported that "Almost every prospective juror in the original pool of 74 called up for examination raised a hand when asked if he or she had read about the case or seen it on television" (November 19, 1980 at p. B-2). On October 10, 1980, during the hearing, the *New York Post* reported a: "Police allegation that 'she had written certain notes indicating that she was going to commit this murder' ". On October 15, 1980, the *New York Post* published the bold headline: "DIET DOCTOR'S GIRL HOPED TO DIE WITH HER LOVER".

created by these pretrial proceedings. Thus, no case ever needed more desperately the protection of the rule in *Gannett*.

The New York Court of Appeals Decision

The New York Court of Appeals was forced to acknowledge that "substantial publicity surrounded the developments of this case" and recognized that the trial court refused to close the pretrial proceedings because the statements which were the subject of the suppression hearing "had been known to the public for months". The court refused to grant Jean Harris a new trial because the petitioner failed to prove that prejudice "actually resulted from the failure to close the proceeding". New York's rule requiring petitioner to prove actual prejudice in the face of such pervasive publicity that permeated the entire jury, is in conflict with the decisions of this Court interpreting the Sixth Amendment.

It is well settled that a trial judge, to safeguard the due process rights of an accused, has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1506, 16 L.Ed.2d 600 (1966); *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). This proscriptive action is required because of the universal recognition that adverse publicity can endanger the ability of a defendant to receive a fair trial. This Court has repeatedly ruled that where *trial* publicity reaches the magnitude evident in the *Harris* case, prejudice is presumed. *Rideau* v. *Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Estes* v. *Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1506, 16 L.Ed.2d 600 (1966). In *Rideau*, *Estes* and *Sheppard*, the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In reversing the convictions of the defendants in those cases, the Court did not examine the *voir dire* for evidence of actual prejudice because the high level of publicity impelled a presumption of prejudice.

The same atmosphere prevailed in Jean Harris' prosecution. When almost every prospective juror in the original pool of 74 jurors called for service admitted they had been exposed to reports of the case, either in the newspapers or on television, the conclusion is inescapable that the attitude of the entire venire toward Jean Harris was infected with this hostile publicity.

In the wake of *Gannett*, more than 410 cases spread throughout the United States, involving the litigation of closure motions have been catalogued by the Reporters Committee for Freedom of the Press.* Thus, the fragile problem of balancing the interests of a free press against an accused's right to a fair trial continues to create issues of constitutional proportion that are a constant source of controversy in our federal and state courts. Among the problems unresolved by *Gannett*, and aptly illustrated by Jean Harris' case, which must be decided if total chaos in the orderly litigation of these important rights is to be avoided, are:

1) Whether the propriety of granting a closure motion in a pretrial hearing depends in any fashion on the success or failure of the defendant's suppression motion.

2) Whether the decision to exclude the press should depend in any degree upon whether the public has already been exposed to other harmful information.

3) When the publicity generated by the pretrial hearing is pervasive must the defendant show actual prejudice in order to obtain a new trial.

Taking each of these issues one at a time, it seems manifest that the drastic decision to bar the press from pretrial proceedings must be made on much more objective criteria than a premonition of whether or not the motion to suppress will be granted or denied. Once it is determined that there is a reasonable risk that a defendant's right to a fair trial will be prejudiced by the high level of publicity in the community, a closure

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* Reporters Committee for Freedom of The Press, 800 18th Street, N.W., Washington, D.C. 20006.

motion must be granted regardless of whether or not the motion to suppress is successful. This is the only way the rule of *Gannett* can be applied uniformly.

Furthermore, in this case, even though the statements were not suppressed, the bullets found in Jean Harris' car were and that volatile evidence was widely publicized in Westchester County. In addition, a defendant in a criminal trial should enjoy the right of having such dramatic evidence as "Oh, my God, I think I've killed Hy" introduced to jurors in the controlled environment of a courtroom where proper instructions may be given and appropriate cross-examination can blunt the impact of such a declaration. It makes no sense to have the Jury battered with such an inflammatory term as "confession" long before they receive accurate information in the sterile atmosphere of the courtroom.*

Furthermore, in virtually every criminal case there will be disclosure of harmful evidence months before the pretrial proceedings commence. But, surely, the decision concerning whether the press should be excluded in the pretrial proceedings cannot be made to depend upon the fact that there has already been bad publicity. The constitutional impulse for excluding the news media from the pretrial hearings rests on the premise that further harmful publicity should be avoided.

And finally, the only meaningful remedy for a defendant whose closure motion has been erroneously denied is a reversal of the conviction. The rule cannot depend upon a showing of prejudice after the fact. Prejudice is presumed under the rule which requires that a pretrial hearing be closed. Otherwise

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* The American Bar Association's Advisory Committee on Fair Trial and Free Press, after extensive research, found that adverse publicity which occurs during a trial (Jean Harris' had commenced with jury selection) is even more damaging than extensive pretrial publicity. The Committee wrote: "Information reported well in advance of trial may be forgotten; information appearing during the trial seems far more likely to remain in the mind of the trier of fact if he is exposed to it. Further, he may be more inclined to seek out this information when he is personally involved in the case" *Fair Trial and Free Press*, Tentative Draft 1976 at p. 40.

there would be no purpose in banning the press from a court proceeding. Once a court determines that a judge erred in denying a closure motion because of a misconception of the law, the defendant is subjected to the very prejudice sought to be avoided. The adverse effect of exposing the jury panel to this type of publicity immeasurably and irreparably infects the entire trial. In this case, the New York Court of Appeals tacitly acknowledged the potential for prejudice but failed to take corrective action because actual prejudice was not proven. This ruling is in conflict with the cases of this Court acknowledging the presumption of prejudice where cases are tried under similar circumstances.

Thus, it is imperative that this Court identify for the guidance of trial courts the constitutional standards to be employed by judges in granting or denying closure motions. Since this Court last considered whether or not a defendant had been prejudiced by inordinate publicity (*Murphy* v. *Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44L.ED.2d 589 [1975]) the power of the media has escalated enormously.

A fair and objective assessment of guilt or innocence is one of the most cherished policies of our system of justice. To have conducted open pretrial hearings which involved the most inflammatory disclosures in the form of "confessions" and suppressed bullets simultaneously with jury selection inevitably prejudiced the jury panel beyond redemption. Surely in this case the adverse publicity was so pervasive that the apparent prejudice must be presumed.

Conclusion

For these various reasons, this Petition for a Writ of Certiorari to review the judgment of the New York Court of Appeals should be granted.

January 19, 1983

Respectfully submitted,

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